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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 243

CITIZEN PUBLISHING COMPANY, STAR PUBLISHING COMPANY, TUCSON NEWSPAPERS, INCORPORATED, ARDEN PUBLISHING COMPANY and WILLIAM A. SMALL, JR., *Appellants,*

v.

UNITED STATES OF AMERICA, *Appellee.*

On Appeal from the United States District Court for the District of Arizona

Memorandum of American Newspaper Publishers Association as Amicus Curiae

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MEMORANDUM OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF JURISDICTIONAL STATEMENT

By consent of the Appellants and Appellee herein, the American Newspaper Publishers Association files this Memorandum as Amicus Curiae in support of the Appellants' jurisdictional statement.

I

INTEREST OF AMICUS CURIAE

The American Newspaper Publishers Association is a membership corporation organized and existing under the laws of the State of New York. Its membership consists of 1022 daily newspapers, whose publications represent more than 90 percent of the total daily and Sunday circulation of newspapers published in the United States.

Interest of Members Publishing under Operating Agreements

Forty-four member newspapers of this Association located in twenty-two large metropolitan cities throughout this country have a direct, vital interest in the resolution of the legal issues raised by the District Court's *per se* ruling in this case. Each of these cities has two newspapers operating under agreements similar to the one in this case.

The one feature common to all such agreements is the merger or consolidation of mechanical, circulation, advertising, and other business functions as a means of achieving cost economies essential to the preservation of two separately owned competing and independent sources of news and editorial views in a relevant market which otherwise could not support two fully competing daily newspapers.

Preservation of Failing Newspaper the Key to Operating Agreement

The question presented in this case, as stated below, concerns only situations where an operating agreement is resorted to as a means ancillary to the primary purpose of enabling a failing newspaper to continue in news and editorial competition with the other financially sound paper.

For purposes of this Memorandum, the Amicus herein adopts the factual statement made by the Appellants in their jurisdictional statement.

Accommodation of Antitrust Policy to Maintenance of Competition in Press Functions

Beyond the interests of the group of Association members who are parties to an operating agreement is the vital interest of Association members generally in the resolution by this Court of a proper accommodation of antitrust policy to situations in communities where an operating agreement is the only feasible means of preserving daily newspaper competition through two independent sources of news and editorial views. These social and political values are the primary and indispensable objects in keeping the failing newspaper alive as a press rival in a market otherwise unable to support two separately owned daily newspapers.

II

THE CORE SUBSTANTIAL QUESTION PRESENTED

The basic issue herein is whether the District Court erred in its illegal *per se* ruling which excluded consideration of all factual questions under Section 1 of the Sherman Act.[1]

The Amicus submits that the court below erred in foreclosing a Rule of Reason inquiry pursuant to this Court's construction of the ancillary restraints doctrine, stated infra. The District Court should have applied that doctrine to determine whether the com-

[1] This Court has warned against the inappropriateness of summary judgment in antitrust cases involving complex questions *e.g., Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464 at 473 (1962).

mercial provisions of the operating agreement were reasonably ancillary to the main lawful purpose of preventing the demise of the Citizen in the Tucson market where inherent economic factors otherwise made survival of only one paper the alternative.

This case therefore raises substantial and important issues this Court should resolve.

III

INEXORABLE ECONOMIC FORCES IN THE DAILY NEWSPAPER PUBLISHING BUSINESS ACCOUNT FOR NEWSPAPER OPERATING AGREEMENTS

Rule of Reason Approach to Facts of Daily Newspaper Publishing

This Court has stated that the Rule of Reason "normally requires an ascertainment of the facts peculiar to the particular business". *White Motor Co.* v. *United States*, 372 U.S. 253 at 261 (1963).

This is such a case. The resolution of the questions herein require consideration of newspaper operating agreements in the context of the realities of the business of daily newspaper publishing as it exists and operates today. This is the threshold of inquiry to determine the nature and extent of competition that is as a matter of hard reality achievable in the face of the inherent market forces described below.

Two Commercially Competing Dailies Virtually Extinct

It is indisputable that despite the "population explosion" since World War II, natural economic forces continue to confirm this Court's statement that "Daily newspaper competition within individual cities has grown nearly extinct * * * ". *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594 at 603 (1953).

This is due to the sheer reality that most cities simply cannot support two commercially competing metropolitan dailies. Indeed, were it not for the existence today of joint operating newspaper agreements in 22 communities and single ownership of two dailies in many other cities, the sole daily newspaper cities would account for almost all of the total city dailies.

The antitrust laws cannot repeal these inherent and unique structural characteristics of the daily newspaper publishing business. In that spectrum daily newspaper failures have been the main cause of outright suspensions of publication. Likewise, natural economic barriers account for the minimal attempts at new entries of metropolitan daily papers.

Paradoxical Effects of Per Se Ruling of District Court

Viewed in that setting, the paradoxical consequences of the District Court's *per se* ruling under Section 1 of the Sherman Act become apparent. By rejecting the defendants' offer of evidence and proof that the failing Citizen could not have survived in commercial competition with the financially strong Star, the court below assumed, *in vacuo,* undue restraints on commercial competition which was in fact not effective competition and was on the brink of becoming completely nonexistent because of the imminent bankruptcy of the Citizen.

The District Court compounded this anomaly by ignoring that the legitimate main purpose of the operating agreement is to maintain effective competition in news and editorial views. This preserves a public interest characterized by Judge Learned Hand as "closely akin, to, if indeed not the same as, the interest protected by the First Amendment". This is the

paramount interest the commercial provisions of the operating agreement are designed to make lasting. Here the interest of the consumer newspaper readership for which the essential functions of the press are performed should prevail.

IV

DOCTRINE OF REASONABLE RESTRAINTS ANCILLARY TO A MAIN LAWFUL PURPOSE SHOULD HAVE BEEN APPLIED BY DISTRICT JUDGE

This Court, as the final arbiter of judicial construction of antitrust legislation, has approved and affirmed the Rule of Reason since it was first defined in the landmark opinion of the Court in *Standard Oil Co. of New Jersey* v. *United States*, 221 U.S. 1 (1911). The Sherman Act has been characterized by the Court in *Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344 at 359-360 (1933) as "a charter of freedom" having "a generality and adaptability comparable to that found to be desirable in constitutional provisions" and containing prohibitions that "are not mechanical and artificial".

The District Court in the instant case was persuaded by the Government that the Rule of Reason adjudication by a trial on the merits under Section 1 of the Sherman Act does not apply to an operating agreement between two newspapers because the merger of commercial functions in circulation and advertising department and division of revenues from such unification constituted "price fixing" and "profit pooling".

The Amicus submits that the *per se* ruling of the court below is erroneous as a matter of law. It misconceives the course of this Court's judicial interpreta-

tions of the Sherman Act. This Court has found no inconsistency between its position on the Rule of Reason and its condemnation of some agreements and practices as unreasonable *per se*.

In the latter class of restraints fall cases where there is an agreement, combination or conspiracy which has no purpose other than undue restraints upon, or suppression of, competition and hence where there is a "lack of any redeeming virtue" (see *Northern Pacific Ry. Co.* v. *United States*, 356 U.S. 1 at 5 (1958).[2]

This is not such a case. Here the validity of the operating agreement should have been judged by the surrounding circumstances. The doctrine of reasonable ancillary restraints, pronounced by this Court, is the touchstone for adjudication in this type of case. It is the antithesis of the mechanistic *per se* ruling below, which excluded consideration of all factual issues under Section 1 of the Sherman Act, relevant to the circumstances surrounding the origin of the operating agreement. This brushed aside offers of evidence and proof that the paramount purpose of the operating agreement was to prevent the death of the Citizen in a market which could not economically support two commercially competitive dailies.

As originally formulated by Chief Justice Taft (then Circuit Judge) in *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed, 271 at 282 (6th Cir. 1898), aff'd 175 U.S. 211 (1899), and later elaborated as quoted below by Justice Brandeis in *Chicago Board of*

[2] The listings by this Court in *Northern Pacific* and other opinions of classic illegal *per se* violations of the Sherman Act are all cases where an agreement or combination was found to *have no other purpose than elimination of competition.*

Trade v. *United States,* 246 U.S. 231 at 238 (1918),[3] the ancillary restraints doctrine makes lawful, as reasonable, restraints which are subservient or ancillary to a main lawful purpose and of no broader scope than reasonably necessary to achieve such a legitimate primary objective.

This is a case of ancillary restraints reasonably related to a countervailing and predominant "redeeming virtue". That virtue is the public interest harmonization of the reasonableness of joint newspapers commercial operations and the overriding prime purpose of making available to the newspaper readership in a community the dissemination from two independent and separate sources of news and editorial voices.

This diversity is obviously fundamental in the case of newspapers which are so essential to the functioning of the American democratic society, as stated in *Times-Picayune,* supra. Legally permissive unification of the business functions of two metropolitan papers to achieve cost savings essential to the survival of one of

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[3] "Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences."

the papers is justified by the preservation of vigorous competition between the two papers on the level of news and editorial opinions for the benefit of the public.

This gives workable content to the adaptability of the general standards of the Sherman Act as contemplated by the Congress and recognized by this Court.

When, as in this case, the survival of a failing newspaper in a given community is dependent upon savings from joint operation of advertising and circulation departments, the automatic application of *per se* illegality rules to such situations will leave the alternatives of a sole daily newspaper community or a complete merger of the failing and healthy papers.[4] Lawful as these results would be, it is clear that sustaining the legality of operating agreements such as the one in this case is more compatible with the public policy of the antitrust laws.

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[4] Lower federal courts have taken cognizance of the natural economic factors accounting for cities with a single daily newspaper. *Union Leader Corp.* v. *Newspapers of New England, Inc.*, 284 F. 2d 582 at 584 (1st Cir. 1960); *United States* v. *Harte-Hanks Newspapers, Inc.*, 170 F. Supp. 227 at 228-229 (N.D. Tex. 1959).

In *Brown Shoe Co.* v. *United States*, 370 U.S. 294 at 319-320 (1962), this Court noted that in a complete merger the 1950 amendment to Section 7 of the Clayton Act is intended by Congress to preserve the failing company doctrine of *International Shoe Co.* v. *FTC*, 280 U.S. 291 (1930). The Court also referred to the Congressional intent that Section 7 would not impede "a merger between a corporation which is in financial health and a failing one which can no longer be a vital competitive factor in the market". See VI infra, for comments of Amicus on the failing company doctrine with reference to the partial merger in this case.

V

UNIQUE EFFECTS OF SIGNIFICANT DISPARITIES IN THE INTERRELATED CIRCULATION AND ADVERTISING REVENUES OF TWO RIVAL DAILY NEWSPAPERS

A unique behavioral aspect of daily newspaper publishing stems from significant changes, upward or downward, in the circulation and advertising revenues of a newspaper. In *Times-Picayune,* supra, this Court noted that "Advertising is the economic mainstay of the newspaper business". Likewise, this Court recognized in *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1935), that advertising revenue is the lifeblood of a newspaper.

Those comments are fully confirmed by empirical data. It is indisputable that 70 to 75 percent of the revenues of a daily newspaper are derived from advertising, of which the bulk is local retail display advertising. The other two sources are national display advertising of goods or services distributed through local outlets and classified advertising.

In a two daily newspaper city, the crucial factor accounting for a decline in the financial condition of one of the papers is a significant disparity in circulation and advertising revenue between the two papers. In the newspaper business this is known as the downward or upward spiral, as the case may be, of circulation and advertising revenue.

Finding 68 of the District Court in this case is an apt judicial recognition and description of this characteristic behavioral feature of the daily newspaper business, as follows:

> "The quality, circulation, and advertising revenues of a newspaper are interrelated. Generally, as the quality of a newspaper improves it receives

wider public acceptance and its circulation increases. As the circulation increases, the newspaper becomes more attractive to merchants as an advertising medium and advertising revenues consequently increase. The increased revenues, in turn, enable the publisher to increase his expenditures on the news and editorial staff, wire services, and syndicated features and otherwise improve the quality of the newspaper. As a corollary to this process, it is to be expected that if the quality of the newspaper falls, there will be a loss of circulation to other publications, which will adversely affect newspaper advertising revenues, and a decline in advertising revenues will further adversely affect the quality of the newspaper, resulting in a further decline in circulation."

It is ironic that Judge Walsh's *per se* ruling under Section 1 of the Sherman Act is at odds with his Finding 68. For in Tucson and other cities where operating agreements have been made, it is precisely this downward or upward spiraling effect which is the prime threat to the demise of the less successful paper. Once the latter paper reaches a failing condition, the operating agreement becomes the means of assuring the community of the continuation of the two quality daily papers as independent rivals in the scope and depth of news coverage and editorial opinions.

This Court's admonition that "the facts peculiar to the particular business" must be given due consideration also brings into purview the respects in which newspaper costs differ from those involved in the production of industrial commodities.

One difference is that the newsstand and subscription prices of a daily newspaper bear only a minor portion

of the total costs of producing the paper and that the newspaper cannot meet even the cost of the newsprint by adding a markup to the newstand and subscription price of the newspaper.

These cost factors, as Judge Walsh's Finding 68 further indicates, are interlinked with the substantial adverse effects upon one of the papers of a downward spiral of circulation and advertising revenues and the substantial advantages to the other paper of an upward spiral in circulation and advertising revenues. These spirals and disparities are seldom reversible. Consequently, the paper injured by a downward spiral slips at an accelerating rate on the road to failure.

It is common knowledge that the ever growing competition from radio and television advertising has resulted in substantial losses in the share of advertising revenue by daily newspapers and this accentuates the downward spiral of the losing paper in the two daily cities.

In sum, the crucial point is that all of the implacable economic forces described herein regarding certain chief structural and behavioral characteristics of the daily newspaper publishing business make an operating agreement, such as the one in this case, the only viable alternative to the demise of the paper in a failing condition.

VI

THE FAILING COMPANY DOCTRINE SHOULD HAVE BEEN APPLIED TO THE PARTIAL NEWSPAPER MERGER UNDER THE OPERATING AGREEMENT

The District Court's *per se* ruling is further erroneous in that it excluded application of the failing company doctrine to the partial merger of business functions of the Star and Citizen, which was accom-

panied by a conveyance of all of the operating assets of the newspapers into a joint ownership.

This was therefore a limited merger. The two papers retained their separate entities and separate publications, as well as separate and independent operations of their respective news and editorial departments and staffs.

All of these were terms of the 1940 operating agreement.

The novelty of this question further calls for resolution by this Court. Nothing in the construction of the Sherman Act compels the application of the failing company doctrine *only* to a complete merger of the business and press functions of two daily newspapers. To the contrary, where, as here, the partial merger assured the continuation of two untrammelled and diverse sources of news and editorial views, there is a rational basis for concluding that the readership interest of the two papers is benefited without injury to any other public interest.

In acceding to the Government's position that the failing company doctrine was inapplicable to the partial merger, the District Court expressed the view that a complete merger of the two papers under single ownership would have made pertinent the failing company doctrine. (Tr. Feb. 15, 1967, p. 412).

Certain Findings of Fact of the District Court after trial of issues other than under Section 1 of the Sherman Act reveal that the Citizen was a failing newspaper prior to and as of 1940 when the operating agreement was consummated. These Findings, summarized below, reveal that the Citizen had met the imminent

bankruptcy or hopeless insolvency test of a failing company announced in *International Shoe Co.* v. *FTC*, 280 U.S. 291 (1930). That test, the Amicus submits, should be deemed applicable to a partial as well as total merger and in those respects applicable under the Sherman Act as well as under Section 7 of the Clayton Act.

There is inherent contradiction in certain subsidiary Findings of Fact and the conclusory Finding 17, as shown below. Finding 12 states that from 1932 to 1940, the Citizen operated at a substantial loss, defrayed by contributions of its stockholders. Finding 14 states that the Citizen attempted but could not obtain additional financing. Finding 15 asserts that for many years prior to 1940 the Citizen was unable to pay a dividend and by March, 1940, owed debts of more than $109,000, of which $79,000 was to its stockholders—another way of stating that the Citizen was then insolvent and not merely in a transitory financial difficulty.

Despite these Findings of Fact, the conclusory Finding 17 states that at the time the operating agreement was made and became effective

> "Citizen Publishing was not then on the verge of going out of business, nor was there a serious probability at that time that Citizen Publishing would terminate its business and liquidate its assets unless Star Publishing and Citizen Publishing entered into the operating agreement".

Finding 17 should be considered clearly erroneous. Apparently the court below believed that its Finding 14, which included reference to the fact that Small, Sr. testified that in 1939 he was prepared to finance

the Citizen's losses "for some little time" out of his resources other than the earnings of the Citizen, negated imminent failure. This is a delusive test of what constitutes a failing newspaper. A newspaper publisher, as recorded instances show, may be subjectively motivated by considerations of prestige, family and community pride to subsidize for a time the losses of a failing newspaper. In no case, however, has a court judged the failing condition of a company by departing from inquiry into whether a company is in the "red" or the "black" based on its own financial statement. Whether the Sherman Act or Section 7 of the Clayton Act brings into purview the failing company doctrine, in all such cases subsidy has not been a factor in the relevant yardstick.

CONCLUSION

For the foregoing reasons, this Amicus believes that the District Court's judgment warrants a plenary hearing on the merits, and accordingly urges that probable jurisdiction be noted.

Respectfully submitted,

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